IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1397

JOSEPH JUIDICE, Individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., Individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

against

HARRY VAIL, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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Appellants appeal from an order of the United States District Court for the Southern District of New York entered on January 28, 1976, which declared unconstitutional New York Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 on their face and further enjoined the operation of the statutes as against appellees and members of their class. Further the injunction was ordered applicable retroactively as well as prospectively. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court of the United States.

Opinion Below

The opinion of the District Court granting appellees' application to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 is reported below at 387 F. Supp. 630 (S.D.N.Y. 1975).

The opinion and order, later modified, of the three-judge court declaring the statutes involved unconstitutional and granting to plaintiffs and members of their class a permanent injunction is not yet reported. It is reproduced herein as Appendix "A" (1a).*

A separate opinion granting class action status is reproduced as Appendix "B" (17a).

Jurisdiction

This action was brought pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, to declare unconstitutional and enjoin New York Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 which are part of Article 19 dealing with contempt. The original opinion and order was entered January 7, 1976 (Appendix "A", (1a)). The order was modified and replaced by an order entered January 28, 1976. The defendants appealing filed their notice of appeal February 6, 1976. Copies of the later order and the notice of appeal are reproduced herein as Appendices "C" (19a) and "D" (21a).

The jurisdiction of the Supreme Court to review the decision and order herein is conferred by 28 U.S.C. §§ 1253 and 2101(b).

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* Numbers in parentheses followed by "a" refer to Appendix herein.

Statutes Involved

New York Judiciary Law §§ 756, 757, 770, 772, 773, 774 and 775 (McKinney's Book 29). These provide a procedure for punishing civil contempts as defined in Judiciary Law § 753. The statutes invalidated are reproduced within App. "A", the opinion of the Court below (10a-14a).

Briefly summarized the statutes dealing with contempt arising from the failure to comply with the order of the court:

(1) § 756 provides that where the offender has failed to pay a specific sum of money an *ex parte* order may issue committing the person until the money is paid or he is discharged according to law. (This was provided for in the fining order issued here after the respondents failed to appear on the order to show cause).

(2) § 757 provides for either an order to show cause or a warrant of attachment to bring the case before the (state) court. (The latter, subd. 1 would result in arrest before any adjudication. It was not used herein).

(3) § 770 provides for a final order if the accused has committed the offense and must be punished by fine or imprisonment. (A special procedure is provided for Domestic Relations Law § 245 and other matrimonial orders for payment of alimony or counsel fees.)

(4) § 772 simply provides for decision of the order to show cause and punishment as in § 770.

(5) § 773 provides for a fine to indemnify the aggrieved party. If actual loss is not shown, a fine must be imposed not exceeding costs and expenses plus $250.

(6) § 774 provides a limit to imprisonment. For a fine of under $250, the limit is three months; if

more, six months. Also there is a provision that the offenders must be brought before the court within 90 days, if imprisoned for an indeterminate term or more than three months. Notice is provided for.

(7) § 775 provides that where the offender cannot endure the punishment or pay the money or perform the act, the court may discharge the offender.

Questions Presented

1. Was the District Court correct in concluding that abstention, due to the pendency of state court proceedings and their nature, was not applicable to the instant action brought against the state judges?

2. Are the several sections of New York's Judiciary Law unconstitutional *on their face* because

(a) they allow an adjudication of contempt without an actual hearing (based on default in appearance of order to show cause).

(b) § 757 does not require notice of the possible results of non-appearance at the show cause hearing other than the person served will be in contempt?

(c) §§ 756, 770, 772 and 774 do not require informing the alleged offender of his right to counsel (or assigned counsel if indigent)?

(d) the fine and alternatively incarceration permitted under §§ 756, 770, 773 and 774 are deemed punitive and is paid to the judgment creditor?

3. Was this a proper class action?

4. Did the District Court err in granting partial summary judgment when the only motions before it was for a preliminary injunction and a cross motion to dismiss?

5. Did the District Court err in giving retroactive application to its judgment?

Statement of the Case

The District Court ultimately granted partial summary judgment declaring seven cited sections of New York's Judiciary Law unconstitutional on their face on the basis of a "typical" case of the named plaintiff. Harry Vail suffered a default judgment ($534.36) in the City Court of Poughkeepsie, Dutchess County, New York. Then in proceedings supplementary to the judgment, he was served with a subpoena by the attorney for the judgment creditor to appear for a deposition relative to an examination of his assets which might be available to satisfy the judgment. Vail did not appear.*

Thereafter on the basis of the default and in accordance with New York law, upon application of the attorney for the judgment creditor, Vail was ordered to appear to show cause why he should not be punished for contempt for his failure to appear. Appellant Judge Juidice signed this order to show cause. Vail was served with this order to show cause.

When Vail disregarded this order and once again failed to appear in court, Judge Juidice signed another order imposing a fine ($250 plus $20 costs), payable to the judgment creditor (Public Loan Company) in reduction of the judgment. It apparently provided that if the fine was not paid within 30 days, upon proof of due service, an order might issue *ex parte* directing the Sheriff to take Vail into custody.** In Vail's case this occurred. He was released the next day upon payment of the fine.

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* The subpoena pursuant to N. Y. Civil Procedure Law and Rules (CPLR) 5223 must state that: "failure to comply with the subpoena is punishable as a contempt of court," must be served at least 10 days before its return date (CPLR 5224) and upon any examination if the person subpoenaed does not understand the English language that "the judgment creditor shall, at his own expense, provide a translation of all questions and answers."

** The form of the order should be same as in the case of Patrick Ward, another appellee whose order of contempt was annexed to the original papers granting temporary restraining order in the District Court.

The above recitation is based on the District Court's version of the facts which, in turn, was based solely on affidavits submitted by appellees and their attorney. These were submitted in support of their motion for a preliminary injunction. They also alleged indigency. (Obviously if any judgment debtor is indigent the examination in supplementary proceedings would be non-productive to the judgment creditor. Furthermore, if such fact is pointed out to the court, such debtors as appellees would be released from any civil imprisonment.) It should be noted that there were numerous other situations before the Court below, some of which did not involve even alleged indigency—i.e. the appellees could pay the fine.* Indeed, for the most part, they paid the fine.

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* Briefly, the contentions were and this is not to concede the absence of any factual issues, as the defendants were moving to dismiss and plaintiffs never established these allegations in state court to oppose contempt. Thus appellant Judges could have no basis to controvert these claims, although they have never been properly established in any evidentiary hearing in a court, state or federal.

(1) Patrick Ward owes a state court judgment of $146.84. He failed to appear at a subpoena examination, in response to an order to show cause, or pay a fine imposed. He was subject to commitment for his failure. (Compl. ¶'s 43-61)

(2) Richard McNair owes a judgment of $362.42. He failed to appear at a subpoena examination, respond to an order to show cause, or pay a fine ($293.75) imposed. He was jailed for five hours, paid the fine on money from "rent", and money his wife borrowed from her credit union. It is significant that the judgment was for services rendered to plaintiff McNair's wife. While he contends he is "indigent", he had the resources to pay the fine ["rent" money and borrowing], a substantial portion of the judgment. (Compl. ¶ "74").

Thereafter another plaintiff was added in this action:

(3) James Hurry owes a judgment of $90.43. He, too, ignored all suplementary proceedings to examine him as to his assets and the order to show cause to punish him for contempt. He ignored the finding order. Warned by the Sheriff

(footnote continued on following page)

Prior Proceedings

On institution of the action, the appellees obtained temporary restraining orders in the district court enforceable against the appellant Judges against their commitment to jail based on the state court orders of contempt, thereby circumventing the state court proceedings. District Judge Cannella ordered the convening of a three-judge court, 387 F. Supp. 630 (S.D.N.Y. 1975).

(footnote continued from preceding page)

that he would be committed January 2, 1975 he intervened in the instant action. While he claimed many debts, he did not claim indigency and contended (¶ 14, Aff., Dec. 31, 1974) that he "refuses to pay the fine because he maintains that Defendant Redl never properly repaired his car." Thus failure to pay was not because of any indigency.

Then four more plaintiffs were permitted to intervene in the action:

(4) Leslie Nameth owes a judgment of $69.82. His situation is quite similar to Hurry. He ignored all legal process and notices. He, too, asserted that he "refused to pay the fine because he maintains that Defendant Redl did not give him a proper credit on the towing charges . . ." (Aff. Jan. 7, 1975, ¶ 11) This failure to pay was not because of any indigency.

(5) McKinley Humes owes a judgment of $233.84. He, too, ignored all legal process and notices. He faced the *danger* of imprisonment. He had never appeared in state court.

(6) Joanne Harvard owes a judgment of $413.40. She ignored all legal process and notices, was arrested and committed for nonpayment, at which time she promptly paid the fine, allegedly through a "loan" from her mother. She asserted she has been threatened with commitment again. She asserts she has no money to make installments payments on her outstanding judgment. However no legal proceedings in state court were ever instituted.

(7) Joseph Rabasco was under a court order to make support and mortgage payments to his wife. He defaulted, allegedly after losing his job, and stated he was on unemployment insurance. His wife sought an order of contempt. Of all the plaintiffs below, Rabasco alone appeared in court on

(footnote continued on following page)

The three-judge court, after hearing her motion for a preliminary injunction and the state defendants' motion to dismiss, declared the several sections of New York Judiciary Law unconstitutional and enjoined further application. In a separate memorandum and order District Judge MacMahon granted class action status. On appellants' order to show cause to resettle the order and for a stay, the court changed the order, making the declaration of unconstitutionality retroactive and stating that the order was for "partial summary judgment", and failing to accord a stay to the appellants (19a).

(footnote continued from preceding page)

the hearing. He allegedly asked Justice Grady, presiding there, to assign a lawyer. While it was asserted Justice Grady "refused", the Justice did adjourn the case from January 6, 1975 to an unspecified date so that Mr. Rabasco could retain a lawyer. It was stated private counsel wanted a $500 to $1,200 retainer. Mr. Rabasco did retain Mid-Hudson Valley Legal Services as his attorney. Within two days it had drawn up the affidavit for this action. Thus to claim Mr. Rabasco was refused counsel is absurd. His hearing was adjourned and he retained an attorney.

(8) Richard Russell owes a judgment of $932.11 on a lease he broke. The usual defaults occurred. On January 30, 1975, pursuant to a commitment order of *March 8, 1974*, he was arrested and committed for non-payment of his fine. The *same day*, he paid his fine ($289.95) allegedly on money his father lent him. (Aff., ¶ 15, February 13, 1975).

(9) Helen Thorpe owed a judgment of $112.75 to Redl, an auto shop. The usual defaults occurred. She was arrested and committed, for *three hours*, when her nephew allegedly loaned her $139.63 and her fine was paid (Aff. ¶ "12", February 13, 1975).

(10) Robert H. Harrel and his wife Evella owes a judgment for medical services. While Mr. Harrel is purportedly to have intervened, there was no indication he has ever retained the attorneys herein. He had left home before the motion for intervention. While he was committed two times, for a total of *six hours*, each time his mother, brother or sister lent him the money to pay the fine and he was immediately released. As Mrs. Harrel did not know his whereabouts, we doubt if this was a real case or controversy.

Appellants then applied to Mr. Justice Thurgood Marshall, for a stay of judgment. Justice Marshall granted the stay on February 12, 1976 (23a). Reproduced as Appendix E (23a). An application by appellees for modification of the stay was denied March 1, 1976.

The Questions Presented On This Appeal Are Substantial

1. The District Court Erred In Not Applying The Doctrine Of Abstention For Reasons Of Comity And Federalism.

The every concept of a federal court assuming jurisdiction in this action against the appellant Judges to review these state court orders strikes at the heart of basic principles of equity, comity and federalism. The appellees should have been relegated to the state court to pursue their grievance. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). In extending *Younger* v. *Harris*, 401 U.S. 37 (1971) to civil proceedings, *Huffman* might very well be limited to those civil proceedings "more akin to a criminal prosecution than most civil cases." 420 U.S., at 604. The proceeding in contempt are akin to a criminal prosecution for purposes of *Huffman*, as it can result in the offender being fined or jailed upon non-payment of the fine. Contrary to the court below (ftn. 14) the statute, Judiciary Law § 753 does not define civil contempt as "civil", it simply describes acts which constitute "civil contempt". While instituted by a private litigant, civil contempt has been defined as quasi-criminal or semi-criminal. Numerous cases in New York support the quasi-criminal nature of civil contempt. *Matter of Carlson* v. *Podeyn*, 12 A D 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961); *Dwyer* v. *Town of Oyster Bay*, 28 Misc. 2d 952, 217 N.Y.S. 2d 392 (Sup. Ct., Nassau Co., 1961) ("semi-criminal"). That the contempt is quasi-criminal because it may result in fine or imprisonment does not alter its remedial character. *Croma Glass Corp* v. *Ferm*, 500 F. 2d 601 (3d Cir. 1974); *U. S.*

Steel Corp. v. *United Mine Workers,* 393 F. Supp. 942 (D. C. Pa. 1975).

It is clear that even if a commitment is denominated "civil", *Huffman* v. *Pursue, Ltd.,* warrants abstention. See *Schmidt* v. *Lessard,* 421 U.S. 957 (1975), vacating and remanding *Lessard* v. *Schmidt,* 379 F. Supp. 1376 E.D. Wisc. 1974).

Given the fact that the appellees never appeared before appellants, although served with notice, it was a flagrant breach of federalism to hold that state court judges violated the constitutional rights of people who never appeared in court. This Court has said, *Rizzo* v. *Goode,* —— U.S. ——, 46 L.Ed. 2d 561, 574-575 (1976), that principles of federalism (and abstention) have not been limited to criminal proceedings.

The appellees could not ignore state court orders. Regardless of the constitutional issues, they had to obey those orders and not bypass orderly judicial review (in the state court) by instituting a federal action. *Walker* v. *City of Birmingham,* 388 U.S. 307, 319 (1967); *Maness* v. *Meyers,* 419 U.S. 449, 458 (1975).*

2. The District Court Simply Substituted Their Own Untenable Views In Declaring The Several Statutes Unconstitutional On Their Face On The Grounds Cited Thereby Upsetting The State Proceeding Supplementary To Judgment.

It should be abundantly clear that the declaration of facial unconstitutionality of Judiciary Law §§ 756, 757, 770,

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* It also should be noted that New York law is not as clear as the court below thought (4a). Abstention to obtain a state interpretation of the contempt hearing procedure would also be required. *Carey* v. *Sugar,* —— U.S. ——, 44 L.W. 4416 (Mar. 23, 1976). *Carey, id.* 4417, also supports the proposition that failure to present the federal claims in state court warrants abstention. *Cf.* Opinion below (4a).

772, 773, 774 and 775 raises a substantial issue.* Besides the fact, recognized by the court below, that a hearing is provided by the statutes (7a)**, the basic constitutionality of the contempt procedure in New York has been upheld by the Second Circuit, holding that a challenge did not even present a substantial constitutional question and thus did not require a three-judge court. *Agur* v. *Wilson,* 498 F. 2d 961, 967 (2d Cir. 1974) *cert. den.* 419 U.S. 1072, *reh. den.* 402 U.S. 939. The statutes are procedural and simply evocative of the power of a court to punish civil contempt. *On their face* they provide for notice and an opportunity to be heard, the hallmarks of due process.

As in *Agur, supra* (at 967) one cannot doubt every appellee here was given the opportunity for a hearing on the merits if exercised. No valid excuse was given for non-participation. To that extent the appellees can be deemed to have waived the hearing and have no due process or equal protection claim. *Boddie* v. *Connecticut,* 401 U.S. 371, 378-379 (1971).

On each of the grounds cited in the opinion of the district court, the court below was erroneous in declaring the several sections of the Judiciary Law unconstitutional *on their face.* We take them up seriatim.

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* It is doubtful that any state lacks a statute on civil contempt of court. They are basically drafted in the same way as New York's. Thus the opinion below casts in doubt literally dozens of state statutes. Eg. (1) Burn's Ind. Ann. Stat. 34-4-7-1 *et seq.;* —9 makes clear if defendant fails to answer, attachment and punishment issue. (2) Mich. Compiled Law Ann. (1968), 600.1701-1745; 600.1715 provides for $250 fine. (3) Minn. Stat. Ann. Ch. 588 (1947); 588.10 provides for punishment of $250. (4) 27 Page's Ohio Rev. Code, 2705.01; .03 (hearing by self or counsel; .05 (trial and punishment). (5) Ore. Rev. Stat. § 33.010, .110 (1974); see .020 ($100 fine); .140 (non-appearance). (6) Tenn. Code Ann. § 23.901 (1956); .903 ($50 and 10 days). (7) Utah Code Ann. § 78-32-1 (1953). See also, 18 U.S.C. § 401(3).

** "It is clear that the challenged sections of the Judiciary Law provide an opportunity for a hearing at the time the show cause order is made returnable." (7a).

A. Permitting Adjudication Of Contempt Without An Actual Hearing

Besides the still valid holding that due process does not require additional notice to a judgment debtor who had had his day in court before judgment was rendered, *Endicott Johnson Corp.* v. *Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), the law also is clear that due process does not require the actual presence of the alleged offender in a contempt proceeding. If the notice served is sufficient to inform him of the character of the charge against him and of the hearing at which he would have an opportunity to present his defense, due process is provided. *Blackmer* v. *United States*, 284 U.S. 421, 443 (1932).*

The requirement of an *actual* hearing carried to its logical extreme would require the state court to *ex parte* issue a warrant to arrest and bring into court every person simply accused of civil contempt. This procedure is allowed as an alternative procedure under Judiciary Law § 757(2), which in its sweeping opinion, the district court also declared unconstitutional. *Cf. Blouin* v. *Dembitz*, 367 F. Supp. 415, 420 (S.D.N.Y. 1973), affd. on other grounds (abstention), 489 F. 2d 488 (2d Cir. 1974). If the alternative were mandated thousands of alleged offenders would be arrested to insure their presence in court.

B. Failure Of The Notice To Recite That A Failure To Respond May Result In Imprisonment

At the outset it must be noted that none of the statutes involved specify the form of notice or the wording of the order to show cause. The statute does provide for language in the show cause order why the person served should not be "punished for the alleged offense" (§ 757, subd. 1). The statute on its face does not prohibit notice

* The court below's citation of *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 251 (1972) and *Harris* v. *United States*, 382 U.S. 162, 167 (1965) is wide of the mark. Both cases involve incarceration without an *opportunity* for a hearing.

of the penalty consequences of not appearing in response to the order to show cause. But the type of notice specifying the time and place for the hearing and the offense charged to be personally served fully satisfy due process. It is only when the person served is under some special disability that due process might require better notice. *Covey* v. *Town of Somers*, 351 U.S. 141, 146-147 (1956). The district court imported as a due process requirement that the notice *must* include notice of penalty and that the failure to mandate such notice was fatal to the statute. The district court simply imposed its own personal view as to the due process requirement without any factual evidence to support such imposition.

Certainly the cases the court below relied on fail to support this stricture. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (ftn. 20, 16a) deals with notice of service by publication, not the contents of the notice. The contempt proceedings herein were brought on by personal service of an order to show cause. The case of *Lynch* v. *Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) involves persons alleged to be under a mental disability.* The instant case obviously involves persons of sound mind who are capable of understanding the meaning of "contempt".

C. Right To Counsel

Although the court below does not clearly say so, its opinion appears to mandate that the alleged offender must have counsel assigned if indigent. The statutes do not deny appellees the assistance of counsel upon request and the question is open. Curiously, the court below engaged here in the illogical process of treating the civil con-

* To this extent *Lynch* is similar to *Covey, supra*. Furthermore *Lynch*, apparently unappealed, cites *Lessard* v. *Schmidt, supra*. *Lynch* clearly would be subject to abstention, *Huffman* v. *Pursue, Ltd.*, on authority of *Schmidt* v. *Lessard, supra*, 421 U.S. 957.

tempt process as criminal, while in discussing absention it treated the state proceeding as civil.

Indeed it was never established that the appellees were, in fact, indigent. Since the appellees did not appear in response to the order to show cause the subject obviously never arose. *Cf., Argersinger* v. *Hamlin,* 407 U.S. 25, 26 (1972).*

D. The Punitive Nature Of The Fine

The court below held to the view that the fine of $250 payable to the judgment creditor for his damages for the non-appearance was violative of due process. This, of course, only involves § 773, which permits such a fine not in excess of $250 in the absence of any other proof of damage.

This sum is the maximum, *Stewart* v. *Smith,* 186 App. Div. 755, 175 N.Y.S. 468 (1919); *Stark* v. *Kessler,* 277 App. Div. 1122, 100 N.Y.S. 2d 872 (1950). The maximum is not so disaproportionate to the contempt as to be condemned on due process grounds. *Sunbeam Corp.* v. *Golden Rule Appliance Co.,* 252 F. 2d 467, 470 (2d Cir.). The payment of the fine to the judgment creditor is in accord with the authorities. *United States* v. *Mine Workers,* 330 U.S. 258, 304 (1947); *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911); *Atlas Corp.* v. *DeVilliers,* 447 F. 2d 799, 803 (10th Cir. 1971), *cert. denied* 405 U.S. 933, *reh. den.* 405 U.S. 1033.

In addition, the holding below mandating the necessity of a hearing as to the imposition of penalty even upon non-appearance in response to the order to show cause ap-

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* Analogously an appeals court in New York in a similar situation has ruled that persons faced with civil contempt for failure to pay support are to be advised of their right to counsel and have it assigned if indigent. *Rudd* v. *Rudd,* 45 A.D. 2d 22, 356 N.Y.S. 136 (4th Dept. 1974). But *cf. Gagnon* v. *Scarpelli,* 411 U.S. 778, 788-791 (1973). See also *Middendorf* v. *Henry,* —— U.S. ——, 44 L.W. 4401, 4404-6, 7 (Mar. 23, 1976).

pears to be at odds with this Court's recent decision in *National Coal Operators' Ass'n.* v. *Kleppe,* —— U.S. ——, 46 L.Ed. 2d 580. There this Court said (*id.* at 587-588) that any requirement for a hearing must be keyed to a request by the mine operators. The statute there involved provided the mine operators with no more than an "opportunity" for a hearing. "When no request for a hearing is made, the operator has in effect voluntarily defaulted and abandoned the right to a hearing and findings of fact on the factual basis of the violation and the penalty." (*id.* at 589). In the instant case the appellees had the "opportunity" also.

New York's procedure in the enforcement of the order to show cause is upon a resonable basis. The adoption of the procedure applicable to applying civil contempt to supplementary proceedings under C.P.L.R. 5251 (1963), was explained in 6 Weinstein-Korn-Miller, *New York Civil Practice,* § 5251.02, as due to the deficiencies of the prior law (N. Y. Civil Practice Act). Cited was the "notorious disregard for court orders and process relating to the enforcement of judgments . . .", 52-745. To quote (52-746):

> "Even when the Civil Practice Act provided sanctions, they frequently were ignored in practice and the violator merely ordered to do what he initially was supposed to do, with no additional penalties being imposed. Thus, although failure to appear for an examination pursuant to a subpoena or court order was punishable as a contempt, judgment debtors learned that they could willfully flout the order of subpoena; for upon their appearance pursuant to an order to show cause, courts almost invariably required only submission to the examination."

Provisions for relief from imprisonment are provided. 9 N.Y. Jur., *Contempt,* § 66, pp. 393-394. *It must be emphasized that appellees never sought to excuse their fail-*

ure to pay the fine in the State court or claim they were unable to do so. Therefore, so far as the record in the State court showed, the appellees were fined and failed to pay; there is no showing they could not pay. Indeed, as we have pointed out, the fines were immediately paid in all cases of imprisonment.

As the *Atlas* case (447 F.2d at 803) shows the imprisonment is not for debt and, in fact, New York has a long standing policy against enforcing money judgments by contempt based on the belief that the use of contempt sanction under such circumstances would be tantamount to imprisonment for debt. 6 Weinstein-Korn-Miller, § 5251.03. See also *Matter of Reeves,* 274 N.Y. 74, 79, 8 N.E. 2d 283, 111 A.L.R. 389.

It is patent that in every respect, the District Court was attempting with one fell swoop to rewrite the established law dealing with procedures supplementary to judgment without any record to support its strictures. Cf. *Lindsey* v. *Normet,* 405 U.S. 56, 58, against "federalizing" the law of landlord and tenant.

3. Class Action Relief Was Not Proper.

In a separate memorandum, Judge MacMahon, as a single judge, granted class action relief pursuant to Rule 23, Federal Rules of Civil Procedure. By creating a class consisting of all persons who have been, or presently are, subject to civil contempt proceeding the order went way beyond the parameters of the case before it.

Thus it covered persons represented by counsel, able to pay the fines, completely aware of the consequences of contempt, those fined to compensate the judgment creditor in sums greatly above any punitive fine of $250. While it can be conceded all persons subject to civil contempt have an interest in not being held in contempt, it is doubtful a federal court, with any awareness of equity, federalism and comity, should entertain such base desires.

The memorandum confused the case by lumping into the class the whole spectrum of contempt offenders without any reasonable basis. Its pervasive effect was shown by the decision of the local sheriffs not to execute any contempt fine orders in matrimonial non-support cases until the stay order was issued by Justice Marshall. See N. Y. Law Journal.

4. The Court Below Erred In Determining The Merits With A Final Injunction Without A Trial.

The procedure followed by the District Court also presents a substantial question for review. The court below granted a final judgment against the constitutionality of the several statutes in favor of appellees, without a trial. At the time this action came before the court the appellees were moving for a preliminary injunction and the appellants were moving to dismiss. The appellees made no request to the court below (by way of motion) for final or even partial summary judgment. The appellees had not answered, but only moved to dismiss. Yet, the District Court granted a declaratory judgment and a permanent injunction, striking down numerous State statutes without a trial of the necessarily disputed issue of indigency the Court itself found material, and without any procedural safeguards such as a Federal Rules of Civil Procedure 56 summary judgment motion.

The particular vice of course is that the District Court assumed as facts the allegations of the complaint and statements in affidavits as a basis for a final judgment of unconstitutionality. Thus, the District Court decided that all the appellees were indigent,* decided that every inference would be in favor of appellees and, in general, denied appellants herein their procedural rights guaranteed by the Federal Rules of Civil Procedure. In so

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* Our brief below showed, on appellees' own affidavits, some plaintiffs were not indigent, but simply would not accept the judgment of the state court. (See also, ftn. p. 6)

doing the District Court acted contrary to the law in its own Circuit, even where there are motions for summary judgment from all parties. *Rhoads* v. *McFerran*, 517 F. 2d 66 (2d Cir. 1975).* Obviously, the question of indigency, notice, amount of fines had never been presented to the state courts, but the federal court, without a hearing, solely on affidavits and without a motion to go to final judgment decided all issues.

5. The Retroactive Nature Of The Judgment Is In Defiance Of Established Authorities

The making of the judgment retroactive to all state court contempt proceedings in the state of completion was in defiance of *res judicata* and unsupportable on the record before the District Court. The final judgment swung its sword retroactively as well as prospectively. It wiped out thousands of civil contempt orders in New York without regard to the effect on the administration of justice in New York. It certainly laid out new standards for an entire body of law in New York. This was in utter contradiction the principle of *res judicata* applicable in each of the completed contempt proceedings.

Furthermore, even in clearly criminal cases, retroactive application of a decision must be based on certain factors; (1) purpose to be served by the new standards (2) the extent of the reliance by public officials on the old standards (3) effect on the administration of justice of a retroactive application of the new standards. *Daniel* v. *Louisana*, 420 U.S. 31 (1975). Even in the exercise of proper judicial discretion, the court below could not justify giving retroactive effect to its declaration of unconstitu-

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* A three-judge statutory District Court is bound by the law applicable in its District and Circuit. *Sunshine Anthracite Coal Co.* v. *Adkins*, 31 F. Supp. 125, 127 (E.D. Ark. 1940), aff'd 310 U.S. 381 (1940).

tionality. Regardless of whether the new standards are correct they should have only operated prospectively. What its massive effect will be if not set aside is impossible to estimate at this time.

CONCLUSION

For the foregoing reasons probable jurisdiction should be noted and the judgment reversed.

Dated: New York, New York, March 25, 1976.

Respectfully submitted,

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APPENDIX A

Opinion (and Order) of Three Judge Court. Vail, et al. v. Quinlan, et al. (S.D.N.Y. 74 Civ. 4773).

MacMahon, *District Judge*

This three-judge court has been convened, pursuant to 28 U.S.C. § 2281, to hear and determine this action, brought under the Civil Rights Act and its jurisdictional counterpart, 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), by individual judgment debtors and all others similarly situated. Challenging the constitutionality of certain statutes of the State of New York, plaintiffs seek class action determination[1] and money damages, as well as declaratory and injunctive relief.

The challenged statutes, Sections 756, 757, 765, 767, 769-775[2] of Article 19 of the New York Judiciary Law (McKinney 1968), implement supplementary or post-judgment proceedings for collection of money judgments. They permit a judgment debtor, who has failed to comply with a disclosure subpoena concerning his ability to satisfy a judgment debt, to be held in contempt, fined and imprisoned without a hearing.

We hold that certain of the statutes in question, specifically, Sections 756, 757, 770, 772, 773, 774 and 775, violate the due process clause of the Fourteenth Amendment and accordingly that they are void and may no longer be enforced.[3]

Statutory Scheme

A creditor, unable to satisfy a money judgment, may compel a judgment debtor to disclose all matter relevant to satisfaction of the judgment.[4] Disclosure is generally effected by requiring the debtor, in response to a subpoena issued by the creditor, to attend a deposition or to supply information by answers to written questions submitted by

the creditor.[5] False swearing or failure to comply with the subpoena is punishable as a contempt of court.[6]

Procedures by which a debtor is held in contempt are set out in the Judiciary Law and constitute the statutory scheme challenged here. If the debtor does not comply with the disclosure subpoena, an order requiring him to show cause why he should not be punished for contempt will issue solely upon the basis of an affidavit by the creditor's attorney showing that the debtor failed to respond to the subpoena (§ 757(1)). If the debtor does not appear for a hearing upon the return date of the order to show cause, the court will make a final order directing that he be punished by fine or imprisonment (§§ 772, 770). The fine is in an amount sufficient to indemnify the creditor for any loss or injury caused as a result of the debtor's contempt, or, if no loss or injury is shown, in an amount not exceeding costs plus $250 (§ 773).

On the basis of an affidavit of the creditor's attorney showing that a demand for payment of the fine has been made and refused, an *ex parte* warrant is issued committing the debtor to prison until the fine is paid (§ 756). The debtor may remain incarcerated for up to 90 days before he is brought before the court for a review of the proceedings and a determination as to whether he should be discharged from imprisonment (§ 774). If the debtor is unable to endure the incarceration or to pay the sum of money, he may petition the court for release (§ 775), but the burden of proof is on the debtor to show why he should no longer be held.[7]

The case of the plaintiff Vail is typical of the plight of the judgment debtor under the challenged statutory scheme. Vail and his wife were the subject of a default judgment for $534.63 entered in favor of Public Loan Company in January 1974. At that time, Vail and his family were on public assistance. On April 22, 1974, Charles Morrow,

attorney for Public Loan, caused a subpoena to be served on Vail, requiring him to appear on May 28 before Charles Morrow for the taking of a deposition regarding all matters relevant to the satisfaction of the judgment. Vail did not appear for the deposition.

On the basis of the subpoena, an affidavit of due service, and an affidavit by Charles Morrow that Vail did not appear and that his conduct was calculated to and did actually defeat, impair and prejudice the rights and remedies of the judgment creditor, Judge Joseph Juidice of the Dutchess County Court issued an order on July 22 directing Vail to appear at the Dutchess County Court on August 13, to "show cause why he should not be punished as for contempt for violation of and noncompliance with the said subpoena in that he failed to appear or respond thereto." When Vail did not appear in County Court, Judge Juidice issued an "Order Imposing Fine," which held Vail in contempt and required him to pay $270 to the judgment creditor.

When Vail failed to comply[8] with the Order Imposing Fine, Charles Morrow, on the basis of the papers previously submitted on the application for the order to show cause, an affidavit of due service of the Order Imposing Fine, and an affidavit of Morrow that Vail had not complied, applied for and obtained an *ex parte* commitment order on September 23. The commitment order directed that, without further notice, the sheriff of any county arrest Vail and commit him to the county jail, that he be held in custody until the fine of $270 was paid, together with the sheriff's fees and the disbursements on the execution of the order.

Vail was arrested in his home on October 1 and committed to the Dutchess County Jail. At the time, he had only one dollar to last him until he received his next public assistance check. He and his family owned no property

except household furniture and clothing. Vail was released the next day when a relative loaned him $294.25 to pay the fine plus additional costs.

ABSTENTION

A preliminary question for determination is whether we should abstain from deciding the issues raised in this action. Plaintiffs never raised their constitutional claims in state court, although the challenged statutory scheme does provide an opportunity for a hearing. Defendants contend that federal intervention before the state has an opportunity to construe its own laws is an untenable interference with the duty and authority of the state courts to enforce their judgments. Further, defendants cryptically assert that, even if no appeal is available from any or some of the orders of the defendant judges, a debtor in plaintiffs' posture must still exhaust his state appellate remedies.[9]

Abstention is a judge-made doctrine based on considerations of federalism and a need to avoid premature constitutional adjudication. It allows a federal court, although having jurisdiction, to decline decision on the merits of the controversy. The doctrine is invoked when determination of a state law issue may resolve or materially alter the constitutional claim.[10]

Defendants first contend that since the issues raised here have never been presented to a state court, interests of comity and federalism warrant dismissal of the action. It is clear, however, that when the challenge is to the constitutionality of statutes which are not ambiguous, abstention should not be used to require vindication of a federal claim in state court.[11]

The method by which the civil contempt provisions are implemented cannot be in doubt, for each of the representative plaintiffs has been subjected to these statutes.

The challenged statutes were originally enacted in 1909. They are not ambiguous on their face; nor have defendants suggested a limiting construction by which a state court could resolve the constitutional claim. We think, therefore, that we should not decline to reach the merits of this case under the traditional formulation of the doctrine of abstention.

More forcefully, defendants contend that the abstention doctrine articulated in *Younger* v. *Harris*, 401 U.S. 37 (1971), should bar this action. In *Younger*, the Supreme Court held that considerations of comity and the reluctance of equity courts to interfere with criminal prosecutions prevented a federal court from intervening by way of an injunction or declaratory judgment in a criminal prosecution pending in state court. *Younger* was expanded in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), to apply to a civil proceeding brought under a state's nuisance statute to enjoin exhibition of obscene films.

Huffman did not extend *Younger* to apply to all pending state court actions. The Supreme Court characterized the nuisance proceedings as "more akin to a criminal prosecution than most civil cases."[12] In *Huffman*, the state was a party to the proceedings because the action had been brought by the county prosecutor. Enforcement of the nuisance statute was found to be in aid of, and closely related to, criminal statutes which prohibited the exhibition of obscene materials. The Court, therefore, held *Younger* to apply to civil proceedings only when intervention would disrupt the very interests which would underlie a state's criminal laws.

In *Anonymous* v. *Association of the Bar of the City of New York*, 515 F.2d 427 (2d Cir. 1975), the question was whether intervention in a state disbarment proceeding was comparable to the disruption in *Huffman*.[13] The court found that it was, noting the characterization of the pro-

ceedings as quasi-criminal and the state's special interest in controlling the fitness and character of members of the bar.

When the circumstances of the instant case are measured against *Huffman* and *Anonymous,* it is clear that they do not fit within the limited extention of *Younger*. The challenged statutory scheme is designed to facilitate a creditor's collection of a judgment debt. The civil contempt proceedings are initiated by private parties to enforce compliance with subpoenas issued by private attorneys. They are not related to New York's criminal statutes; nor do they play any part in the enforcement of the state's criminal laws. Moreover, the challenged proceedings are defined as civil by the Judiciary Law.[14]

It is also a predicate for *Younger* dismissal that the parties have an opportunity to raise and have their federal issues decided by a competent state tribunal.[15] Under Article 19 of the Judiciary Law, a debtor who fails to appear at the show cause hearing may be found in contempt, fined and subjected to incarceration *ex parte* (§ 770). If the court merely imposes a fine which the debtor fails to pay on demand a warrant is issued ordering the debtor's imprisonment (§ 756). The challenged statutes, therefore, permit the debtor to be thrown in jail without an actual hearing on the basic issues of whether he has paid or is able to pay the fine, whether his assets were originally exempt from execution, or whether he ever received notice of the order to show cause or was otherwise notified of the hearing.

In *Gerstein* v. *Pugh,* 420 U.S. 103 (1975), the Supreme Court held that a federal court injunction against the detention of a criminal defendant on the basis of an Information did not violate principles of *Younger*. The Court distinguished between an injunction brought against a state criminal prosecution and one directed against in-

carceration without a preliminary hearing.[16] Since plaintiffs claim that the statutory scheme challenged here also permits incarceration without a preliminary hearing, *Younger* does not apply.

Constiutional Validity

Plaintiffs level four independent attacks under the due process clause against the statutory scheme supporting the civil contempt provisions of the Judiciary Law: (1) Sections 756, 757, 770, 773 and 774 permit an adjudication of contempt and order of imprisonment without an actual hearing; (2) Section 757 does not provide for adequate notice or warning of the consequences of failure to appear at the show cause hearing; (3) Sections 756, 770, 772 and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent; and (4) the fines and incarceration permitted under Sections 756, 770, 773 and 774 are punitive. Defendants contend that the notice and hearing provisions of the statutory scheme are sufficient under the due process clause. In examining these contentions, we recognize that the degree of procedural safeguard required by the constitution will be influenced by the importance of the private interest effected.[17]

It is clear that the challenged sections of the Judiciary Law provide an opportunity for a hearing at the time the show cause order is made returnable. However, if the debtor does not appear, he is adjudged in contempt and subject to a warrant of commitment. Due process requires more than the mere opportunity to be heard when the interest involved is deprivation of the debtor's liberty. The statutory scheme presently allows imprisonment solely on the basis of a creditor's affidavit of service and an *ex parte* proceeding. A finding of contempt can be properly made only upon a hearing with both parties present.[18] The de-

fect is not cured by providing a hearing within 90 days of incarceration. If a hearing is to serve its full purpose, it must be held before, and after, imprisonment.[19]

A concomitant to a fair hearing is notice appropriate to the nature of the case.[20] Here, notice must be complete and clear, given the substantial deprivation of liberty that may result from failure to respond. Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment.[21]

Moreover, the right to a hearing prior to imprisonment is ineffective without counsel.[22] The debtor cannot be expected to understand, much less to present, the legal and factual defenses to a finding of contempt that might be raised. Surely, a debtor who is deprived of his liberty is as much entitled to due process as is a defendant charged with a crime.[23]

Finally, although it is well established that judicial sanctions in civil contempt are proper to compensate the complainant for losses sustained or to coerce compliance with a court's order,[24] the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive. Where compensation is intended and a fine imposed, it must be based on evidence of the complainant's actual loss.[25] Section 773 requires the imposition of a fine up to $250 plus costs when the alleged contempt has not been shown to have resulted in any loss or injury to the creditor. If coercion is the purpose of the sanction, it can be justified only if the person has the ability to comply. The absence of the procedural safeguards of indictment and jury trial can be justified only by the conditional nature of the imprisonment and the contemnor's continued defiance.[26] Section 756 permits the arrest and incarceration of a debtor, whether or not he is able to comply with

the order by paying the fine. To the extent, therefore, that the fines and imprisonment contained in the Judiciary Law are punitive, they cannot be imposed in a civil contempt proceeding.[27]

Accordingly, under the due process clause of the Fourteenth Amendment, we declare unconstitutional and enjoin further application of Sections 756, 757, 770, 772, 773, 774 and 775 of Article 19 of the New York Judiciary Law.

So ordered.

Dated: New York, N. Y.
January 6, 1976

s/ .....
J. Edward Lumbard, U.S.C.J.

s/ .....
Lloyd F. MacMahon, U.S.D.J.

s/ .....
John M. Cannella, U.S.D.J.

Appendix A.

FOOTNOTES

[1] The certification of this action as a class action was made by Judge MacMahon, acting as a single district court judge, pursuant to 28 U.S.C. § 2284(5) and the limited three-judge court jurisdiction set forth by the Supreme Court. See *Hagans* v. *Lavine*, 415 U.S. 538, 543-45 (1974).

[2] § 756. Issue of warrant without notice

Where the offense consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison, until the costs or other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

§ 757. Order to show cause, or warrant to attach offender

The court or judge, authorized to punish for the offense, may, in its or his discretion, where the case is one of those specified in either section seven hundred and fifty-five or seven hundred and fifty-six, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offense, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offense.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in this section, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court at which a contested motion may be heard.

§ 765. Execution of warrant when undertaking not given

If an indorsement is not made upon the warrant, as prescribed in section seven hundred and sixty-four; or if such an indorsement is made and an undertaking is not given, as prescribed in section seven hundred and sixty-six; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case, the sheriff must produce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance.

Appendix A.

§ 767. When habeas corpus may issue

If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment can not be issued. In that case, the court, upon proof of the facts, must issue a writ of habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offense charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.

§ 769. Interrogatories and proofs

When the accused is produced, by virtue of a warrant, or a writ of habeas corpus, or appears upon the return of a warrant, the court, judge, or referee, must, unless he admits the offense charged, cause interrogatories to be filed, specifying the facts and circumstances of the offense charged against him. The accused must make written answers thereto, under oath, within such reasonable time as the court, judge, or referee allows therefor; and either party may produce affidavits, or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answers, and subsequent proofs, the court, judge, or referee must determine whether the accused has committed the offense charged.

§ 770. Final order directing punishment; exception

If it is determined that the accused has committed the offense charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or be-

fore the judge or referee; the court, judge, or referee must make a final order directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly, except where an application is made under this article and in pursuance of section two hundred forty-five of the domestic relations law or any other section of law for a final order directing punishment for failure to pay alimony and/or counsel fees pursuant to an order of the court or judge in an action for divorce or separation and the husband appear and satisfy the court or a judge before whom the application may be pending that he has no means or property or income to comply with the terms of the order at the time, the court or judge may in its or his discretion deny the application to punish the husband, without prejudice to the wife's rights and without prejudice to a renewal of the application by the wife upon notice and after proof that the financial condition of the husband is changed.

§ 771. Punishment upon return of habeas corpus

Where the accused is brought up by virtue of a writ of habeas corpus, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ was directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody under the mandate, by virtue of which he is held by the sheriff, or other officer.

§ 772. Punishment upon return of order to show cause

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in section seven hundred and seventy, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

§ 773. Amount of time

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance

of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

§ 774. Length of imprisonment and periodic review of proceedings

1. Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. In such case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. If the term of imprisonment is not specified in the order, the offender shall be imprisoned for the fine imposed three months if the fine is less than five hundred dollars, and six months if the fine imposed is five hundred dollars or more. If the offender is required to serve a specified term of imprisonment, and in addition to pay a fine, he shall not be imprisoned for the nonpayment of such fine for more than three months if such fine is less than five hundred dollars or more than six months if the fine imposed is five hundred dollars or more in addition to the specified time of imprisonment.

2. In all instances where any offender shall have been imprisoned pursuant to article nineteen of the judiciary law and where the term of such imprisonment is specified to be an indeterminate period of time or for a term of more than three months, such offender, if not then discharged by law from imprisonment, shall within ninety days after the commencement of such imprisonment be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and a review of the proceedings shall then be

held to determine whether such offender shall be discharged from imprisonment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from imprisonment, shall be brought, by the sheriff, or other officer, as a matter of course personally before the court imposing such imprisonment and further reviews of the proceedings shall then be held to determine whether such offender shall be discharged from imprisonment. Where such imprisonment shall have arisen out of or during the course of any action or proceeding, the clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in such action or proceeding, at their last known address.

§ 775. When court may release offender

Where an offender, imprisoned as prescribed in this article, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made to punish a contempt of court committed with respect to an enforcement procedure under the civil practice law and rules, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

[3] In view of this conclusion, we do not reach plaintiffs' further contention that the statutes also violate the equal protection clause of the Fourteenth Amendment and the Fourth, Sixth and Eighth Amendments.

With regard to plaintiffs' claim for money damages, the doctrine of judicial immunity bars recovery against defendants Juidice and Aldrich, both judges of the Dutchess County Court. *Apton* v. *Wilson*, 506 F.2d 83 (D.C. Cir. 1974); *Hill* v. *McClellan*, 490 F.2d 859 (5th Cir. 1974); *Blouin* v. *Dembitz*, 489 F.2d 488 (2d Cir. 1973). Since there are no allegations of malice or bad faith regarding the conduct of defendant Quinlan, sheriff of Dutchess County, the damage claims against him must also be dismissed. *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Tucker* v. *Maher*, 497 F.2d 1309 (2d Cir. 1974); *Fleming* v. *McEnany*, 491 F.2d 1353 (2d Cir. 1974). There being no evidence before us concerning the damages caused by the other defendants, we take no position with respect to the remaining claims for monetary relief.

[4] Section 5223, N.Y. CPLR.

[5] Section 5224, N.Y. CPLR.

[6] Section 5251, N.Y. CPLR, provides: "Refusal or wilful neglect of any person to obey the subpoena . . . shall . . . be punishable as a contempt of court."

[7] *Vought* v. *Vought*, 42 Misc.2d 16, 247 N.Y.S.2d 468 (1964); *In re Black's Estate*, 261 App. Div. 791, 28 N.Y.S.2d 130 (1941).

[8] Vail alleges that, at the end of August, he informed Public Loan that he could not make payments on the underlying debt because of his indigency, but that one of the creditor's employees told him "he would not have to appear in Court" if he made a payment of $5., which Vail did.

[9] Defendants brief, p. 12.

[10] *Kusper* v. *Pontikes*, 414 U.S. 51, 54-55 (1973); *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965).

[11] *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438-439 (1971); *Zwickler* v. *Koota*, 389 U.S. 241, 250-251 (1967); *Harman* v. *Forssenius, supra.*

[12] *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604 (1975).

[13] *Anonymous* v. *Association of the Bar of the City of New York*, 515 F.2d 427, 432 (2d Cir. 1975).

[14] Section 753, Article 19, N.Y. Judiciary Law.

[15] *Huffman* v. *Pursue, Ltd., supra*, 420 U.S. at 594.

[16] *Gerstein* v. *Pugh*, 420 U.S. 103, 108 n.9 (1975).

[17] *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

[18] *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245, 251 (1972); *Harris* v. *United States*, 382 U.S. 162, 167 (1965).

[19] *Fuentes* v. *Shevin, supra; Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970); *In re Harris*, 69 Cal. 2d 486, 446 P.2d 148 (1968).

A section providing that, upon arrest for failure to respond to an order to show cause, the sheriff must bring the debtor directly before the court, might pass constitutional muster if the show

cause order clearly advises the debtor that failure to respond might result in the issuance of a warrant for his arrest. *Cf. Non-Resident Taxpayers Ass'n of Pa. and N.J.* v. *Murray*, 347 F. Supp. 399 (E.D. Pa. 1972), *aff'd*, 410 U.S. 919 (1973); N.Y. Judiciary Law § 757(2).

[20] *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

[21] See *Lynch* v. *Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (three-judge court).

[22] *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[23] *Cooke* v. *United States*, 267 U.S. 517, 537 (1925); *United States* v. *Sun Kung Kang*, 468 F.2d 1368 (9th Cir. 1972); *Abbit* v. *Bernier*, 387 F. Supp. 57, 62 n. 12 (D. Conn. 1974) (three-judge court); *In re Harris, supra.*

[24] *United States* v. *United Mine Workers of America*, 330 U.S. 258, 303-304 (1947).

[25] *United States* v. *United Mine Workers of America, supra*, 330 U.S. at 304; *Leman* v. *Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-456 (1932).

[26] *McNeil* v. *Director, Patuxent Institution, supra*, 407 U.S. at 251; *Shillitani* v. *United States*, 384 U.S. 364, 370-371 (1966).

[27] *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911).

APPENDIX B

Class Action Memorandum. Vail v. Quinlan (S.D.N.Y. 74 Civ. 4773).

MacMahon, *District Judge*

Plaintiffs move, under Rule 23, Fed. R. Civ. P., for class action determination, seeking to represent all persons who have been, or presently are, subject to the civil contempt procedures contained in Sections 756, 757, 765, 767, 769-775 of Article 19 of the New York Judiciary Law (McKinney 1968). Plaintiffs challenge a statutory scheme that permits a judgment debtor, who has failed to comply with a disclosure subpoena concerning his ability to satisfy a judgment debt, to be held in contempt, fined and imprisoned without a hearing. Defendants oppose the motion on the ground that the plaintiffs are not representative of the class as a whole.

It is undisputed that all of the named plaintiffs are judgment debtors who failed to comply with a post-judgment disclosure subpoena issued by the attorney for his judgment creditor. Each was served with an order, issued solely on an affidavit, requiring him to show cause why he should not be adjudged in contempt for failure to obey the subpoena. Each failed to appear at the hearing on the order to show cause. Accordingly, each was held in contempt and, upon failure to pay the fine specified by the court, was incarcerated or subjected to an immediate threat of incarceration pursuant to an *ex parte* commitment order.

Plaintiffs allege that in Dutchess County alone, more than 500 persons have been subject to contempt proceedings under the challenged statutes. The numerosity requirement of Rule 23(a)(1) is, therefore, satisfied since joinder of so many individuals would be impracticable.[1] The common question of the constitutionality of the contempt procedures is sufficient under Rule 23(a)(2).[2] The

representational requirements of Rule 23(a) (3) are satisfied since each member of the class is, or has been, subject to the challenged statutes and to the same alleged deprivation of constitutional rights as the named plaintiffs. Finally, counsel has, and we believe will continue, to prosecute vigorously plaintiffs' claims.[3] This action can be maintained under Rule 23(b) (2) since defendants are alleged to have acted with respect to the plaintiff class as a whole, and relief of an injunctive or declaratory nature would settle the legality of defendants' acts with respect to all members of the class.[4]

Accordingly, plaintiffs' motion for class determination is granted. The class shall consist of all persons who have been, or are presently subject to the civil contempt proceedings contained in the challenged sections of the Judiciary Law.

So ordered.

Dated: New York, N.Y.
January 5, 1976

LLOYD F. MACMAHON
LLOYD F. MACMAHON
United States District Judge

FOOTNOTES

[1] *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Korn* v. *Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972).

[2] *Klein* v. *Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972); *Sero* v. *Oswald*, 351 F. Supp. 522 (S.D.N.Y. 1972); *Desmond* v. *Hachey*, 315 F. Supp. 328 (D. Me. 1970).

[3] *Serritella* v. *Engleman*, 339 F. Supp. 738, 748 (D.N.J.), *aff'd*, 462 F.2d 601 (3d Cir. 1972).

[4] *Gesicki* v. *Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd* 406 U.S. 913 (1972).

APPENDIX C

Order Appealed From.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HARRY VAIL, JR. et al.,

Plaintiffs,

—against—

LAWRENCE M. QUINLAN, individually and in his capacity as Sheriff of Dutchess County, et al.,

Defendants.

Defendants, Juidice and Aldrich, having moved for a stay of this Court's order of January 7, 1976, declaring Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York facially unconstitutional and enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above statutes; and the court having heard Louis J. Lefkowitz, Esq., Attorney General of the State of New York (by A. Seth Greenwald, Esq., Assistant Attorney General), attorney for defendants Juidice and Aldrich, in support of said motion, and Monroe County Legal Assistance Corp., Mid-Hudson Valley Legal Services Project (by John D. Gorman, Esq., Acting Project Director), attorney for plaintiffs, in opposition thereto, and having considered the pleadings, briefs and oral arguments on plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss; and upon the

Appendix C.

briefs submitted and arguments made on defendants' motion for a stay; and

It appearing that there is no genuine issue of any fact material to the resolution of plaintiffs' claim for a declaratory judgment and permanent injunctive relief, it is hereby

ORDERED AND ADJUDGED that partial summary judgment is granted in favor of plaintiffs, declaring that Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York are unconstitutional on their face and permanently enjoining the operation of said statutes against plaintiffs and members of their class, namely, all persons who have been or are presently subject to civil contempt proceedings pursuant to the above sections of the Judiciary Law; and it is further

ORDERED AND ADJUDGED that this court's prior order of January 7, 1976 is so modified; and it is further

ORDERED AND ADJUDGED that defendants' application for a stay is in all respects denied.

Dated: New York, N. Y.
January 23, 1976

J. Edward Lumbard (by H. M.)
HON. J. EDWARD LUMBARD, U.S.C.J.

Lloyd F. MacMahon
HON. LLOYD F. MACMAHON, U.S.D.J.

John M. Cannella
HON. JOHN M. CANNELLA, U.S.D.J.

Judgment Entered 1/28/76
Raymond F. Burghardt
Clerk

APPENDIX D

Notice of Appeal (Filed February 6, 1976).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 4773
(LMM)

JOSEPH JUIDICE, Individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., Individually and in his capacity as a Judge of the Dutchess County Court, et al.,

Appellants,

—against—

HARRY VAIL, et al.,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT

SIRS:

PLEASE TAKE NOTICE that pursuant to 28 U.S.C. § 1253, defendants Juidice and Aldrich and Louis J. Lefkowitz, Attorney General of the State of New York pursuant to New York Executive Law, § 71 hereby appeal to the Sureme Court of the United States from a declaration of unconstitutionality and injunction against the operation of New York Judiciary Laws §§ 756, 757, 770, 772, 773, 774 and 775, as well as the granting of class-action relief as encompassed therein, by judgment of the three-judge court signed and entered January 23, 1976 and this appeal is taken from each and every part of the judgment including class-action relief, as well as the whole thereof.

Appendix D.

Dated: New York, New York
February 6, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for defendants-appellants Juidice and Aldrich and pro se pursuant to Executive Law, § 71

By:

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APPENDIX E

Stay of Order (February 12, 1976).

SUPREME COURT OF THE UNITED STATES

No. A-683

JOSEPH JUIDICE, ETC., et al.,
Appellants

v.

HARRY VAIL, JR., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants and the response filed thereto,

IT IS ORDERED that the judgment of the United States District Court for the Southern District of New York, case No. 74 Civ. 4773, entered January 28, 1976, be and the same, is hereby stayed pending the timely docketing of an appeal in the above-entitled case.

Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the United States District Court for the Southern District of New York is affirmed, this order is to terminate automatically.

Appendix E.

In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the sending down of the judgment of this Court.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme
Court of the United States

Dated this 12th
day of February, 1976.